

YOU’VE COME A LONG WAY, BABY: REHNQUIST’S NEW APPROACH TO PREGNANCY DISCRIMINATION IN *HIBBS*

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INTRODUCTION

Over the years I have written more in criticism of Chief Justice Rehnquist’s Fourteenth Amendment opinions than in praise of them.¹ This Article marks a

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1. See, e.g., Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000) [hereinafter Post & Siegel, *Equal Protection by Law*] (showing an alternate basis for *Morrison* in the federalism history of the Second Reconstruction); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*] (arguing for an approach to the Section 5 power that would recognize Congress’s role in interpreting the Constitution as it enforces it); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) [hereinafter Post & Siegel, *Protecting the Constitution from the People*] (objecting to the juricentricity of current Section 5 doctrine); Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) [hereinafter Siegel, *Reasoning from the Body*] (arguing that the Court’s habit of “reasoning from the body” has produced equal protection and substantive due process doctrine that fails to recognize and restrain state action that enforces traditional sex roles); Reva B. Siegel, *Concurring Opinion*,

departure. It offers an appreciation of Rehnquist's last sex discrimination opinion, *Nevada Department of Human Resources v. Hibbs*.² In titling the Article "You've Come a Long Way, Baby," I refer not to the big beat album,³ nor to the cigarette advertising slogan,⁴ but instead to a frequent refrain of the 1970s women's movement.⁵ William Rehnquist was an opponent of the Equal Rights Amendment (ERA) while serving in the Nixon Justice Department—and, more than any other Nixon appointee, a vocal critic of the Court's sex discrimination jurisprudence in his first decade on the Court.⁶ Any reader of these early Rehnquist sex discrimination opinions, or Rehnquist's more recent opinions restricting Congress's power to enforce the Fourteenth Amendment,⁷

in WHAT ROE V. WADE SHOULD HAVE SAID 63-85 (Jack M. Balkin ed., 2005) [hereinafter Siegel, *Concurring Opinion*] (rewriting *Roe* using equal protection arguments in briefs and lower court opinions available at the time of the decision); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) [hereinafter Siegel, *She the People*] (showing an alternate basis for *Morrison* in the federalism history of the Nineteenth Amendment); Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) [hereinafter Siegel, *Rule of Love*] (showing how gendered understandings of marriage shaped the growth of privacy doctrine, as well as federalism doctrines concerning the family); Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Amendment of 1978*, 94 YALE L.J. 929 (1985) (showing that the Pregnancy Discrimination Amendment prohibits employment practices with a disparate impact on pregnant women); see also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. (forthcoming Oct. 2006) [hereinafter Siegel, *Constitutional Culture*] (showing how equal protection doctrine prohibiting sex-based state action emerged out of the struggle over the Equal Rights Amendment and reflects the views of both its proponents and opponents).

2. 538 U.S. 721 (2003).

3. FATBOY SLIM, YOU'VE COME A LONG WAY, BABY (Astralwerks/Emd 1998).

4. Virginia Slims Advertisement (1989), available at http://tobaccodocuments.org/ads_pm/2058500255.html (last visited Apr. 4, 2006).

5. Robin Morgan's anthology, *Sisterhood Is Powerful*, starts out with an essay called "You've Come a Long Way, Baby" recounting American women's history from the colonies to the 1970s. ROBIN MORGAN, *SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT* (1970). For colloquial usage in the *New York Times*, see Judy Klemesrud, *A Herstory-Making Event*, N.Y. TIMES, Aug. 23, 1970, § 6 (Magazine), at 6, (reporting on preparations for the Women's Strike for Equality, which memorialized the half-century anniversary of the Nineteenth Amendment's ratification, and observing that "to the strike organizers, anybody who actually thinks that the planned parades, demonstrations and guerilla theater actions have anything to do with women being happy about their right to vote for 50 years is probably either a fool, or a male chauvinist—or both. As the women see it, they just haven't come a very way long since 1920, baby, and the strike is intended to air their major grievances and let American womanhood know that the sisterhood is (it is hoped) powerful").

6. See *infra* Part I.

7. See *infra* text accompanying notes 53-54. See generally *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Title I of Americans with Disabilities Act (42 U.S.C. §§ 12111-12117) is barred by the Eleventh Amendment and is not valid legislation under Section 5 of the Fourteenth Amendment); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacks authority under Section 5 of the Fourteenth Amendment and the Commerce Clause to create a federal civil cause of action for victims of gender-

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surely would not have predicted that he would conclude his time on the bench writing a pathbreaking opinion upholding provisions of the Family and Medical Leave Act (FMLA)⁸ as a valid exercise of Congress's Section 5 power. *Hibbs* held that Congress could enact provisions of the FMLA entitling eligible employees to take up to twelve weeks of unpaid leave annually for certain enumerated family care reasons as a congruent and proportional remedy for a pattern of state action violating the Equal Protection Clause.

In what follows, I show the "long way" Rehnquist traveled, from his early criticism of the ERA and first sex discrimination opinions to *Hibbs*—an opinion that seems to endorse an understanding of sex discrimination from which Rehnquist dissented in his early years on the bench. Others have offered explanations for Rehnquist's surprising decision to join and write *Hibbs* as he did. I consider in passing some accounts of the concerns that might have moved Rehnquist to write *Hibbs*, but, in the end, my object is less to explain than to mark the distance Rehnquist traveled over the course of his tenure on the Court. The actual motivations for the *Hibbs* decision will stay shrouded in mystery, at least for some long time to come. For purposes of this Article, I am prepared to treat Rehnquist's change in perspective as the nation's.

Rather than give an account of Rehnquist's motives for writing *Hibbs*, I focus instead on *Hibbs*'s interpretation of the Equal Protection Clause. In the course of demonstrating that the FMLA is appropriate legislation to enforce the Equal Protection Clause as the Court has interpreted it, Rehnquist explains the reach of the Court's equal protection cases differently than his earlier sex discrimination opinions do. *Hibbs* consolidates the meaning of the Court's sex discrimination decisions in new ways. *Hibbs* characterizes as sex stereotypes judgments about "mothers and mothers-to-be"⁹ that for much of the nation's history were deemed reasonable and holds that state action premised upon such stereotypes denies women equal citizenship in violation of the Fourteenth Amendment. *Hibbs* is the first Supreme Court opinion to recognize that laws regulating pregnant women can enforce unconstitutional sex stereotypes, and so introduces an important new understanding of when discrimination on the basis of pregnancy is discrimination on the basis of sex under *Geduldig v. Aiello*.¹⁰ As I show, *Geduldig* and *Hibbs* can be read together: where regulation of pregnant women rests on sex-role stereotypes, it is sex-based state action within the meaning of the Equal Protection Clause.¹¹ Alongside *Planned Parenthood*

motivated violence).

8. See 29 U.S.C. § 2612(a)(1)(C) (2006).

9. Nev. Dep't of Res. v. *Hibbs*, 538 U.S. 721, 736 (2003) (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 99th Cong., 2d Sess. 33, 100 (1986) [hereinafter *Joint Hearing*]).

10. 417 U.S. 484 (1974).

11. See *infra* text accompanying notes 99-104.

of *Southeastern Pennsylvania v. Casey*,¹² *Hibbs* opens the door to the next generation of sex discrimination cases.

I. REHNQUIST, THE EQUAL RIGHTS AMENDMENT, THE NEW RIGHT, AND THE FAMILY

Rehnquist began his career as an opponent of the Equal Rights Amendment with what can most charitably be described as skeptical views of the women's movement. The Nixon administration, in which he served, supported the ERA, ambivalently.¹³ As Assistant Attorney General, William Rehnquist testified in favor of the ERA just before his nomination to the Court, expressing equivocal support for the Amendment. Rehnquist reported that his administration "wholeheartedly support[ed] the goal of establishing equal rights for women" and observed that the President had endorsed the Equal Rights Amendment in 1968.¹⁴ But when asked whether he thought that a federal constitutional amendment was necessary to implement the federal policy against discrimination on the basis of sex that he had endorsed, Rehnquist answered, "No, I don't. I think one could do it by statute."¹⁵ In this reply, Rehnquist was expressing the Nixon Administration's support for an omnibus sex equality statute then under consideration by the House Judiciary Committee, but he also was endorsing the view espoused by many ERA opponents that the ERA was an unnecessary (and possibly dangerous) constitutional amendment that pursued aims that could be accomplished by federal legislation or by judicial interpretation of the existing Constitution.¹⁶ Rehnquist made clear to the Judiciary Committee that his support for the ERA reflected the views of the Nixon administration and that his own views of the matter might differ.¹⁷

Differ they did. In an internal Justice Department memorandum authored in 1970 (made public during his confirmation hearings as Chief Justice in

12. 505 U.S. 833, 875-76 (1992) (reaffirming the constitutional right to abortion and establishing an "undue burden" standard).

13. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972*, at 393-419 (1990).

14. *Equal Rights for Men and Women, 1971: Hearings on H.J. Res. 35,208, and Related Bills and H.R. 916 and Related Bills Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 92d Cong. 311 (1971) [hereinafter *Equal Rights Hearings*] (statement of William H. Rehnquist, Assistant Attorney General, Justice Department); see also *id.* at 321.

15. *Id.* at 324.

16. See Post & Siegel, *Legislative Constitutionalism*, *supra* note 1, at 2003 ("Prominent opponents of the ERA argued that a constitutional amendment was unnecessary precisely because Congress could use legislation to achieve the same ends. (Defenders of this position included Professor Paul Freund, Professor Philip Kurland, Senator Sam Ervin, and then-Assistant Attorney General William Rehnquist—who, in this earlier period, recognized a much greater role for Congress in interpreting the Constitution than he does today.)"); Siegel, *Constitutional Culture*, *supra* note 1.

17. *Equal Rights Hearings*, *supra* note 14, at 324.

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1986¹⁸), Rehnquist advised Leonard Garment, a special consultant to President Nixon, that the ERA posed a grave threat to the family. The memo warned that the “consequences of a doctrinaire insistence upon rigid equality between men and women cannot be determined with certainty, but the results appear almost certain to have an adverse effect on the family unit as we have known it,” characterizing the “overall implication” of the ERA as “nothing less than the sharp reduction in importance of the family unit, with the eventual elimination of that unit by no means improbable.”¹⁹ Suggesting that the ERA might invalidate common law rules for determining the domicile of husband and wife, Rehnquist warned that the ERA threatened to transform “holy wedlock” into “holy deadlock.”²⁰ He was blunt in expressing his mistrust of the ERA’s supporters:

I cannot help thinking that there is also present somewhere within this movement a virtually fanatical desire to obscure not only legal differentiation between men and women, but insofar as possible, physical distinctions between the sexes. I think there are overtones of dislike and distaste for the traditional difference between men and women in the family unit, and in some cases very probably a complete rejection of the woman’s traditionally different role in this regard.²¹

In muted ways, these views shaped Rehnquist’s testimony before the Judiciary Committee. Rehnquist expressed his concern that the ERA would eliminate “women’s traditionally different role” as he warned the Judiciary Committee that the ERA might abolish a husband’s traditional duty to support his wife, asserting that “the proposed amendment would, at least where a wife is not bearing or rearing children, prevent her from suing for support when she is able to support herself” and observing that the ERA might even “require a woman to use child-care facilities and work before she could demand support from her husband.”²²

As Rehnquist was testifying before Congress, conservatives were beginning to focus on the family as a site of political mobilization. In December of 1971, President Nixon acceded to pressure from Pat Buchanan, William F. Buckley, and James M. Kilpatrick and decided to veto a federal childcare program²³ proposed by the women’s movement,²⁴ whose

18. See, e.g., Stuart Taylor, Jr., *Women’s Groups Cites [sic] Rehnquist Memo on Rights*, N.Y. TIMES, Sept. 10, 1986, at A23.

19. Memorandum from William Rehnquist, Assistant Attorney General, to Leonard Garment, Special Counsel to the President, reprinted in *Rehnquist: ERA Would Threaten Family Unit*, LEGAL TIMES, Sept. 15, 1986, at 4.

20. *Id.*

21. *Id.*

22. *Equal Rights Hearings*, supra note 14, at 330 & n.16 (citing Professor Paul Freund); see also GRAHAM, supra note 13, at 417-18 (discussing Rehnquist’s oral and written testimony, and public reaction to it).

23. Comprehensive Child Development Act of 1971, H.R. 6748, 92d Cong. (1st Sess. 1971).

development his administration had, with qualification, supported.²⁵ Nixon's veto message sounded themes expressed in Rehnquist's opposition to the ERA, voicing concern that federal involvement in child care "would . . . alter[] the family relationship" and objecting that "for the Federal Government to plunge headlong financially into supporting child development would commit the vast moral authority of the National Government to the side of communal approaches to child rearing over against [sic] the family-centered approach."²⁶ Phyllis Schlafly's first published attack on the ERA in February of 1972 voiced these same themes more aggressively, denouncing the women's movement as "anti-family, anti-children, and pro-abortion":

Women's lib is a total assault on the role of the American woman as wife and mother, and on the family as the basic unit of society.

Women's libbers are trying to make wives and mothers unhappy with their career, make them feel that they are "second-class citizens" and "abject slaves." Women's libbers are promoting free sex instead of the "slavery" of marriage. They are promoting Federal "day-care centers" for babies instead of homes. They are promoting abortions instead of families.²⁷

24. *Comprehensive Child Development Act of 1971: Joint Hearings Before the Subcomm. on Employment, Manpower & Poverty and the Subcomm. on Children & Youth of the S. Comm. on Labor & Public Welfare*, 92d Cong. 751-52 (1971) (statement of Vicki Lathom, Member, National Board of Directors, Child Care Task Force, National Organization for Women) ("Although NOW is committed to work for universally available, publicly supported child care, we are in accord with flexible fees on a sliding scale, as an interim step, to reflect the urgent needs and varied resources of families."). For an account of the women's movement's advocacy of child care in the late 1960s and early 1970s, see Post & Siegel, *Legislative Constitutionalism*, *supra* note 1, at 1996-2011.

25. For an inside account of the forces in New Right circles in the Nixon White House and on the Hill that combined to pressure Nixon into a veto that would repudiate federal involvement in child care outside the welfare context, see Kimberly Morgan, *A Child of the Sixties: The Great Society, the New Right, and the Politics of Federal Childcare*, 13 J. POL'Y HIST. 215, 231-38 (2001). There was considerable support for federal childcare legislation in this era. A *New York Times* editorial responded to the CCDA veto: "[T]his attack cannot obscure the fact that the concept of child care and development enjoys broad popular support across most of the traditional divisions of politics, class, economics and race." Editorial, *Abandoned Commitment*, N.Y. TIMES, Dec. 11, 1971, at 30. Women's support for child care crossed political lines: The National Women's Political Caucus proposed comprehensive childcare programs as well as abortion on demand to the Republican Platform Committee in 1972. *Abortion and Child Care Planks To Be Proposed to the G.O.P.*, N.Y. TIMES, Aug. 11, 1972, at 8.

26. Veto of the Economic Opportunity Amendments of 1971, 1971 PUB. PAPERS 1174, 1178 (Dec. 10). When the House Committee on Education and Labor tried to respond to Nixon's veto with revised legislation, minority dissenters cited multiple editorials branding the child development bill as a corrosive threat to the nation. Columnist James J. Kilpatrick approved of childcare centers that provided "places where welfare mothers could leave their children while they went off to work," but he called the proposed bill "the boldest and most far-reaching scheme ever advanced for the Sovietization of American youth." H. COMM. ON EDUC. & LABOR, COMPREHENSIVE CHILD DEVELOPMENT ACT, H.R. REP. NO. 92-1570, at 45 (1972).

27. Phyllis Schlafly, *What Is Wrong with "Equal Rights" for Women*, 5 PHYLLIS SCHLAFLY REP. 3-4 (1972).

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Like Rehnquist, Schlafly warned that the ERA threatened to eliminate the “family unit” and the security and status of “women’s traditionally different role.” As Schlafly put it in *The Power of the Positive Woman*, “Elimination of the role of ‘mother’ is a major objective of the women’s liberation movement. Wives and mothers must be gotten out of the home at all costs to themselves, to their husbands, to their children, to marriage, and to society as a whole.”²⁸ The private and public concerns Rehnquist voiced about the ERA sounded themes that conservatives were beginning to perfect into a rallying cry against the amendment.

Rehnquist carried this determination to protect the family from the women’s movement onto the Court. More than any other Justice appointed by President Nixon, Rehnquist resisted the development of sex discrimination doctrine under the Equal Protection Clause.²⁹ In 1983, Ann Freedman described Rehnquist’s approach to sex discrimination during his first decade on the Court: “The concept of ‘real’ sex differences is central to the Rehnquist-Stewart approach.”³⁰

Under this approach, the legal problem of sex discrimination is generally conceived as the use of sex classifications when no “real” differences between women and men are involved. “Real” differences are defined broadly to include definitional differences, legally created differences, and differences

28. PHYLLIS SCHLAFELY, *THE POWER OF THE POSITIVE WOMAN* 87 (1977); see also *id.* at 68 (“The Positive Woman will never fall into the trap of adopting gender-free equality in theory or in practice. The Positive Woman builds her power by using her womanhood, not by denying or suppressing it. The Positive Woman wants to be treated like a woman, not like a man, and certainly not like a sex-neutral ‘person.’”).

29. On notable occasions, the Nixon appointees parted ways in the sex discrimination cases of the early 1970s. For example, while Chief Justice Burger and Justices Powell and Blackmun refused to join Justice Brennan’s opinion in *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion), urging that the Court apply strict scrutiny to sex-based state action, they concurred in the plurality’s decision to strike down the military’s sex-based dependent benefits statute. *Id.* at 691-92. Rehnquist alone dissented. *Id.* at 691 (holding that the statute did not classify based on sex and that a rational basis existed for the differential treatment of men and women). Blackmun joined Justice Brennan’s majority opinion in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (striking down provision of the Social Security Act, 42 U.S.C.S. § 402(g) (1975)), in whose reasoning Burger and Powell generally concurred, 420 U.S. at 654-55, while Rehnquist concurred in an opinion that resisted the majority’s sex discrimination holding, *id.* at 655. Blackmun and Powell joined the majority in announcing intermediate scrutiny of sex-based state action in *Craig v. Boren*, 429 U.S. 190, 214-15 (1976), while Burger and Rehnquist dissented, *id.* at 215-17 (Burger, C.J., dissenting), and *id.* at 217-28 (Rehnquist, J., dissenting), with Rehnquist specifically objecting to the notion that “men challenging a gender-based statute which treats them less favorably than women may invoke a more stringent standard of judicial review than pertains to most other types of classifications,” *id.* at 217 (Rehnquist, J., dissenting). Rehnquist’s objection to heightened scrutiny of sex-based state action in *Craig* might have enforced an antisubordination understanding of equal protection or gender-paternalism, or both. For an account of how controversy over the Equal Rights Amendment shaped the development of modern equal protection law, see Siegel, *Constitutional Culture*, *supra* note 1.

30. Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 *YALE L.J.* 913, 931 (1983).

that result from past discrimination against women. In cases involving “real” differences, review of the relationship between the classification and the goal is deferential.³¹

Time and again, Rehnquist ruled that government was allowed to differentiate between the sexes in recognition of real differences in the circumstances of women and men, interpreting the Equal Protection Clause in ways deeply resonant with Schlafly’s objection that a woman “wants to be treated like a woman, not like a man, and certainly not like a sex-neutral ‘person.’”³² Soon after he arrived on the Court, Rehnquist joined Justice Stewart’s majority opinion in *Geduldig v. Aiello*,³³ which held that discrimination on the basis of pregnancy is not discrimination on the basis of sex; two years later, Rehnquist authored an opinion in *General Electric Co. v. Gilbert*³⁴ applying *Geduldig*’s reasoning to Title VII of the 1964 Civil Rights Act³⁵—an interpretation of the statute rejected by Congress in the Pregnancy Discrimination Act of 1978 (PDA).³⁶ In exempting the regulation of pregnant women from scrutiny for gender bias under the Constitution and federal employment discrimination law, Rehnquist repudiated arguments that the women’s movement was then advancing (often in cases challenging mandatory maternity leave policies), that regulation of pregnant women was presumptively unconstitutional when it enforced stereotypes and sex role prescriptions of the separate-spheres tradition.³⁷

31. *Id.*

32. SCHLAFLY, *supra* note 28, at 68.

33. 417 U.S. 484 (1974).

34. 429 U.S. 125 (1976).

35. 42 U.S.C. § 2000e (1976).

36. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2006)); *cf.* *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (holding that denial of accumulated seniority after pregnancy leave was in violation of Title VII).

37. A classic expression of this understanding is an equal protection brief that Ruth Bader Ginsburg filed in 1972 in a case involving a woman who faced an involuntary discharge from the Air Force because she was pregnant. *See* Brief for Petitioner, *Struck v. Sec’y of Def.*, 409 U.S. 1071 (1972) (No. 72-178). The brief argued that “sex discrimination exists when all or a defined class of women (or men) are subjected to disadvantaged treatment based on stereotypical assumptions that operate to foreclose opportunity based on individual merit” and urged that the pregnancy regulations “should be subject to close scrutiny, identifying sex as a suspect criteria for governmental distinctions.” *Id.* at 15, 26; *see also* Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women’s Enrollment at Columbia Law School*, 102 COLUM. L. REV. 1441, 1447 (2002) (observing that *Struck* was “an ideal case to argue the sex equality dimension of laws and regulations regarding pregnancy and childbirth”). Other briefs arguing that the Supreme Court should recognize regulation of pregnancy as sex-based state action under the Equal Protection Clause prominently include Wendy Williams’s brief in *Geduldig v. Aiello*. *See* Brief for Appellees at 24, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (No. 73-640) (“As with other types of sex discrimination, discrimination on the basis of pregnancy often results from gross stereotypes and generalizations which prove irrational under scrutiny.”); *see also* Brief for Respondents at 18, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (challenging mandatory maternity leave policy).

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Rehnquist was impatient with arguments that regulation concerning pregnancy reflected sex stereotypes, because he viewed pregnancy as a site of real physical difference, and because he viewed as presumptively licit sex-role assumptions that others on the Court called unconstitutional sex stereotypes. In *Michael M. v. Superior Court*,³⁸ Rehnquist urged that a sex-based statutory rape law promoted the state's interest in preventing teen pregnancy better than a sex-neutral statute.³⁹ "We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse."⁴⁰ Rehnquist dismissed arguments that sex-based legislation like the statutory rape law at issue in *Michael M.* enforced sex stereotypes.⁴¹ The legislature had recently considered and rejected proposals to make the statute gender-neutral, and he reasoned:

That is enough to answer petitioner's contention that the statute was the "accidental by-product of a traditional way of thinking about females." . . . Certainly this decision of the California Legislature is as good a source as is this Court in deciding what is "current" and what is "outmoded" in the perception of women.⁴²

In the same vein, Rehnquist acerbically noted that congressional debate over whether to draft women "clearly establishes that the decision to exempt women from registration was not the 'accidental by-product of a traditional way of thinking about females.'"⁴³ In arguing that law could take account of differences in the physical or social circumstances of the sexes, Rehnquist was interpreting the equal citizenship principle of the Fifth and Fourteenth

Susan Deller Ross played a key role in providing arguments to the EEOC that the Equal Protection Clause reached pregnancy discrimination. See Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 798 & n.206 (2004); see also Ruth Bader Ginsburg & Susan Deller Ross, *Pregnancy and Discrimination*, N.Y. TIMES, Jan. 25, 1977, at A33 ("Employers will continue to regard women as people who neither need nor want to remain in the labor market for more than a temporary sojourn. Traditional states of mind about women's proper work once the baby comes are difficult to abandon, even for gray-haired jurists."). For discussion of these briefs and lower court cases recognizing their arguments, see Siegel, *Concurring Opinion*, *supra* note 1.

38. 450 U.S. 464 (1981) (holding that a California statutory rape law providing criminal liability for men only does not violate equal protection under the Fourteenth Amendment).

39. *Id.* at 473-74.

40. *Id.* at 471.

41. *Id.* at 496 (Brennan, J., dissenting) ("It is perhaps because the gender classification in California's statutory rape law was initially designed to further these outmoded sexual stereotypes, rather than to reduce the incidence of teenage pregnancies, that the State has been unable to demonstrate a substantial relationship between the classification and its newly asserted goal.").

42. *Id.* at 471 n.6 (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)).

43. *Rostker v. Goldberg*, 453 U.S. 57, 74 (1981) (holding that selective military conscription of males and not females does not violate equal protection under the Fifth Amendment).

Amendments to give voice to the concerns of those who were fighting the ERA in state houses around the country.⁴⁴ As Phyllis Schlafly explained in *The Power of the Positive Woman*:

The Positive Woman rejects the “gender-free” approach. She knows that there are many differences between male and female and that we are entitled to have our laws, regulations, schools, and courts reflect these differences and allow for reasonable differences in treatment and separations of activities that reasonable men and women want.⁴⁵

During his first decades on the Court, Rehnquist seems to have viewed it as his mission to voice concerns of the women’s movement’s critics. But as the sex discrimination case law aged and Rehnquist was elevated to Chief Justice, he qualified his views and came differently to accept the sex discrimination cases, urging the Court’s critics to accept them as well. This process of reconciliation guides his judgment in *United States v. Virginia*,⁴⁶ an equal protection decision requiring Virginia to admit women to the Virginia Military Institute (VMI), the state’s historically all-male military academy. In *Virginia*, Rehnquist declined to join Justice Ginsberg’s majority opinion restating and strengthening the intermediate scrutiny framework, but he also declined to join Justice Scalia’s unrepentant dissent expressing nostalgia for “such old-fashioned concepts as manly ‘honor’”⁴⁷ that VMI championed. Staking out a space between these contending views, Rehnquist’s concurring opinion addressed Virginia’s interest in preserving a traditionally male school in the face of the Court’s accumulating sex discrimination holdings. In Rehnquist’s view, Virginia was entitled to preserve its all-male admissions policy throughout the decade that the Court began closely to scrutinize sex-based state action (to Rehnquist’s repeated dissent)—until 1982, when the Court announced in *Hogan* that sex-segregated education could violate the Equal

44. Rehnquist was not alone in deciding equal protection cases in response to the ERA debates. As I have elsewhere argued, many of the Justices interpreted the Constitution with attention to the ERA debates during the pendency of the ratification campaign. Given ongoing public debate about the ERA’s effect on rape laws and the military draft, both *Michael M.* and *Rostker* can be understood as part of the “de facto ERA.” See Siegel, *Constitutional Culture*, *supra* note 1.

45. SCHLAFLY, *supra* note 28, at 22. Schlafly continues:

The Positive Woman also rejects the argument that sex discrimination should be treated the same as race discrimination. There is vastly more difference between a man and a woman than there is between a black and a white, and it is nonsense to adopt a legal and bureaucratic attitude that pretends that those differences do not exist. Even the United States Supreme Court has, in relevant and recent cases, upheld “reasonable” sex-based differences of treatment by legislatures and by the military.

Id. at 22-23 & n.7 (citing *Kahn v. Shevin*, 416 U.S. 351 (1974), as “[upholding] Florida’s property tax exemption for widows only” and *Schlesinger v. Ballard*, 419 U.S. 498 (1975), as upholding “a United States Navy rule that permitted female officers to remain four years longer than male officers in a given rank before being subject to mandatory discharge”).

46. 518 U.S. 515, 558 (1996).

47. *Id.* at 601.

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Protection Clause.⁴⁸ At that point, Rehnquist reasoned, Virginia should have taken steps toward complying with the Court's equal protection cases, if not by admitting women, then at least by making a "genuine effort to devote comparable public resources to a facility for women."⁴⁹ At that point, Rehnquist in effect urged, rule-of-law values obliged Virginia to express its commitment to preserving traditional gender roles in a fashion that gave greater deference to the equal citizenship principle—to reaffirm traditional gender understandings *within* the sex equality paradigm, rather than in open dissent from it. Given Virginia's failure to implement the emerging law of sex discrimination, and the state's inability to offer its women citizens an opportunity to attend a sex-segregated school of similar quality, Rehnquist reasoned, it was now time to require Virginia to admit women to VMI.⁵⁰

Virginia did not mark a dramatic shift of position. If by the 1990s Chief Justice Rehnquist was coming cautiously to accept the sex discrimination cases of the 1970s, he was not prepared to extend their scope. In the 1990s, as Congress was considering a new civil rights remedy in the Violence Against Women Act (VAWA), Rehnquist spoke out against the bill in his administrative capacity as Chief Justice.⁵¹ He then authored the decision in *United States v. Morrison*⁵² striking down the statute as exceeding Congress's Commerce Clause and Section 5 powers.

II. REHNQUIST'S DECISION IN *HIBBS*

The decision in *United States v. Morrison* stood at the intersection of two of Rehnquist's longstanding preoccupations: the law of sex discrimination and Congress's power to enforce the Fourteenth Amendment. In his last decade on the Court, Rehnquist took a special interest in cases imposing new limits on Congress's power to enforce the Fourteenth Amendment. He wrote key opinions in *Morrison* striking down provisions of the Violence Against Women Act (VAWA) and in *Board of Trustees of the University of Alabama v. Garrett*

48. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

49. *Virginia*, 518 U.S. at 563.

50. *Id.* at 566.

51. William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 1992, at 1, 3 (objecting to the bill on the ground that its "broad definition of criminal conduct is so open-ended, and the new private right of action is so sweeping that the legislation could involve the federal courts in a whole host of domestic relations disputes"). See generally Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000) (discussing Chief Justice Rehnquist's role in opposing VAWA's civil remedy, while Congress was considering the legislation and in *Morrison*); Siegel, *The Rule of Love*, *supra* note 1, at 2174, 2196-99 (locating federalism arguments against VAWA in history of discourse about privacy and domestic violence).

52. 529 U.S. 598 (2000) (holding that Congress lacks authority under Section 5 of the Fourteenth Amendment and the Commerce Clause to create a federal civil cause of action for victims of gender-motivated violence).

striking down provisions of the Americans with Disabilities Act.⁵³ The new Section 5 decisions vindicated both federalism and separation of powers values, asserting the primacy of the Court's authority to interpret the Constitution and invoking judicial supremacy as a limit on Congress's power legislatively to enforce the Fourteenth Amendment: The Court held that Congress could only enact legislation remedying or deterring conduct that violated the Fourteenth Amendment as the Court had interpreted it.⁵⁴ (The cases are in rather deep tension with Rehnquist's claim in 1970 that the ERA was unnecessary because Congress could simply enact legislation prohibiting the states from engaging in sex discrimination.⁵⁵)

Given the Section 5 jurisprudence of the Rehnquist Court, few thought that the Court was likely to uphold the provisions of the Family and Medical Leave Act (FMLA) challenged in *Hibbs* as a valid exercise of Congress's power to enforce the Fourteenth Amendment.⁵⁶ The holding was "unanticipated because in the years since *Boerne* the Court had invalidated every exercise of Section 5 power it had confronted."⁵⁷ "[T]he smart money was on my opponents," Nina Pillard, attorney for Hibbs, recalled. "A colleague of mine told me there was a 95 percent chance we would lose."⁵⁸ And critics found the *Hibbs* decision itself hard to reconcile with the Court's earlier Section 5 cases. "Arguably, the FMLA does not meet the Court's requirements for Section Five legislation."⁵⁹ The decision, critics complained, "treat[ed] precedent like silly putty."⁶⁰

Since the decision issued, commentators have offered a variety of explanations for Chief Justice Rehnquist's decision to join and write the *Hibbs* majority opinion. Linda Greenhouse and Joan Williams have each pointed to Rehnquist's own family circumstances as a factor that might have moved him to sympathetic understanding of the statute. Rehnquist's wife died of cancer in

53. 531 U.S. 356 (2001).

54. See Post & Siegel, *Legislative Constitutionalism*, *supra* note 1, at 1952-66 (describing this method of limiting Congress's power to legislate under Section 5 as the "enforcement model").

55. See *supra* notes 15-16 and accompanying text.

56. The statute's constitutionality as an exercise of Congress's power under the Commerce Clause was never in doubt. But to confer on private litigants the power to sue states for money damages (as the FMLA does), Congress must draw upon its power to enforce the Fourteenth Amendment. Congress cannot abrogate the Eleventh Amendment immunity of states except when it acts pursuant to its authority under Section 5. *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

57. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 14-15 (2003) (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

58. Joan C. Williams, *Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 365 (2004) (quoting Nina Pillard, counsel for Hibbs).

59. Post, *supra* note 57, at 15-18; Jennifer Yatskis Dukart, Comment, *Geduldig Reborn: Hibbs as a Success (?) of Justice Ruth Bader Ginsburg's Sex-Discrimination Strategy*, 93 CAL. L. REV. 541, 551 (2005).

60. Susana Sherry, *The Unmaking of a Precedent*, 55 SUP. CT. REV. 231, 231 (2003).

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the early 1990s, and his daughter, a single mother and a lawyer, had difficulty meeting work and family obligations—so much so that Rehnquist at times left work at the Court early to help with child care.⁶¹ This experience might have made him more responsive to arguments advanced by the FMLA's advocates and, perhaps, by other Justices who negotiated work-family conflicts in their own careers. Rehnquist may well have believed the FMLA to implicate different values than legislation invalidated in the Court's earlier Section 5 cases. Legislation assisting employees trying to meet both work and family obligations might be more attractive to those interested in preserving family institutions in an era of change than a statute like the civil rights remedy of VAWA, which Rehnquist feared "could involve the federal courts in a whole host of domestic relations disputes."⁶²

Some have speculated that Rehnquist's purposes in writing *Hibbs* were as strategic as they were sincere. *Hibbs* was a 6-3 decision. Once Justice O'Connor decided to sustain the constitutionality of the FMLA, Rehnquist could not block a decision upholding the statute, but he could join the majority and write the opinion. Robert Post suggests that Rehnquist wrote the *Hibbs* opinion in such a way as to signal that popular legislation (specifically Title VII of the 1964 Civil Rights Act) was a constitutional exercise of Congress's power to enforce the Fourteenth Amendment, seeking in this way to protect the Court from the kinds of backlash that might accompany a decision declaring portions of federal employment discrimination law beyond Congress's power to enact. Despite asserting that Congress was obliged to enforce the Court's interpretation of the Constitution, the Court was actually following Congress's interpretation of the Constitution.⁶³

On the available public record, there is no way to adjudicate among these various accounts of Rehnquist's motives in writing *Hibbs*. In fact, all could be true, at the same time. Rather than sort among them, I propose instead in the remainder of this Article to examine how Rehnquist's opinion in *Hibbs* justifies the FMLA as "appropriate legislation" to enforce the provisions of the Fourteenth Amendment.

61. Williams, *supra* note 58, at 374-75; Linda Greenhouse, *Justices, 6-3, Rule Workers Can Sue States over Leave*, N.Y. TIMES, May 28, 2003, at A1.

62. See *supra* note 51.

63. See Post, *supra* note 57, at 17-24. For a demonstration of the ways that the Court followed Congress in interpreting the Constitution in matters of sex discrimination, see Post & Siegel, *Legislative Constitutionalism*, *supra* note 1, at 1984-2004 (demonstrating that the Court's development of sex discrimination doctrine followed congressional activity and was responsive to social movement advocacy); Post & Siegel, *Equal Protection by Law*, *supra* note 1, at 520-21 ("The Court did not find that facial classifications based upon sex required intermediate scrutiny until the 1970s, after the rise of the second-wave feminist movement and congressional enactment of legislation prohibiting sex discrimination in the workplace. In the pivotal case of *Frontiero v. Richardson*, the plurality opinion of the Court was frank to acknowledge how congressional action had affected its own evolving attitude toward sex discrimination.").

As I will show, Rehnquist's Section 5 analysis in *Hibbs* contains an important statement of the Court's sex discrimination cases. Like *Morrison* and *Garrett* before it, *Hibbs* endorses a restrictive interpretation of the Section 5 power that conservatives have long championed.⁶⁴ To justify the constitutionality of the FMLA within this restrictive framework, Rehnquist had to demonstrate that the FMLA remedied a pattern of state action violating the Equal Protection Clause as interpreted by the Court in its sex discrimination cases. In making this showing, Rehnquist interprets the Equal Protection Clause in ways he would not have in his first decades on the Court. Indeed, *Hibbs* applies the prohibition on sex-stereotyping expressed in thirty-five years of sex discrimination cases to practices the Court has not yet analyzed, reasoning about sex discrimination in the provision of family leave in ways that reflect judgments forged in several decades of debate under the Constitution and federal employment discrimination law. In the end, I conclude, Rehnquist's shift in perspective reflects in important part the maturing constitutional understanding of the nation.

To appreciate *Hibbs*'s significance as a statement of Section 1 jurisprudence, one has first to read *Hibbs* as a Section 5 case. *Hibbs* reaffirms the restrictive account of Congress's power to enforce the Fourteenth Amendment that Rehnquist enunciated in *Morrison* and *Garrett*. Congress may reach farther than the Court, but only when it is remedying or deterring violations of the Constitution as the Court has interpreted it:

"Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." . . . In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct. *City of Boerne* . . . confirmed, however, that it falls to this Court, not Congress, to define the substance of constitutional guarantees. . . . "The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." . . . Section 5 legislation reaching beyond the scope of § 1's actual guarantees must be an appropriate remedy for identified constitutional violations, not "an attempt to substantively redefine the States' legal obligations." . . . We distinguish appropriate prophylactic legislation from "substantive redefinition of the

64. The Rehnquist Court recognized limits on Section 5 envisioned in the *Constitution in 2000* litigation manual of the Reagan Justice Department. Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 402-03 (2003). For objections to this narrow view of congressional power, see Justice Breyer's dissent in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 384 (2001) ("There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its § 5 authority, to adopt rules or presumptions that reflect a court's institutional limitations."). See also Post & Siegel, *Equal Protection by Law*, *supra* note 1; Post & Siegel, *Legislative Constitutionalism*, *supra* note 1; Post & Siegel, *Protecting the Constitution from the People*, *supra* note 1.

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Fourteenth Amendment right at issue,” by applying the test set forth in *City of Boerne*: Valid § 5 legislation must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁶⁵

In *Hibbs*, Rehnquist presents the FMLA as a congruent and proportional method of remedying or deterring violations of the Fourteenth Amendment as the Court has interpreted it. This means that the *Hibbs* opinion foregrounds a particular account of the equal protection violation that the FMLA redressed.

When Congress enacted the FMLA, it “exercised its Section 5 power to confer on employees a gender-neutral right to family leave, inhibiting disparate treatment in hiring, promotion, and benefits, while at the same time restraining the operation of employment policies having a disparate impact on employees with family-care responsibilities.”⁶⁶ *Hibbs* works at length to demonstrate that Congress enacted the FMLA to redress and deter patterns of discrimination between men and women in the provision of employment leave.⁶⁷ The *Hibbs* opinion also acknowledges, without emphasizing, Congress’s interest in remedying employment leave policies that have a disparate impact on employees who have family care responsibilities—predominantly women.⁶⁸ This structural argument for the FMLA was central in arguments for the statute’s passage, but it is downplayed in *Hibbs*’s account of the equal protection violation that the FMLA redressed. On the face of it, practices that openly discriminate between the sexes violate the Court’s cases interpreting the Equal Protection Clause as facially neutral practices that inflict sex-based disparate impacts do not⁶⁹—although the Court’s Section 5 cases provide several grounds on which the Congress can prohibit practices that have a disparate impact as part of a strategy for remedying and deterring disparate treatment.⁷⁰

65. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 727-28 (2003) (internal citations omitted).

66. See Post & Siegel, *Legislative Constitutionalism*, *supra* note 1, at 2020. For an account of arguments advanced in congressional debates over the FMLA, see *id.* at 2014-20.

67. See *Hibbs*, 538 U.S. at 728-35.

68. The Court recounts:

The text of the Act makes this clear. Congress found that, “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.” 29 U.S.C. § 2601(a)(5). In response to this finding, Congress sought “to accomplish the [Act’s other] purposes . . . in a manner that . . . minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender-neutral basis[,] and to promote the goal of equal employment opportunity for women and men . . .” §§ 2601(b)(4) and (5).

Id. at 728 n.2 (emphasis omitted); see also *id.* at 738.

69. See *Washington v. Davis*, 426 U.S. 229 (1976) (holding that to challenge facially neutral state action, plaintiffs must demonstrate the challenged action reflects discriminatory purpose; evidence of disparate impact is not sufficient to make out a constitutional violation, though it may be relevant to proving discriminatory purpose).

70. See *supra* text accompanying note 65.

To demonstrate that the FMLA is a remedy for violations of the Equal Protection Clause as the Court has interpreted it, the *Hibbs* opinion discusses at length evidence before Congress suggesting that the states were discriminating between male and female employees in providing leave for family care. This account of the pattern of unconstitutional state action that the FMLA redresses explains the Court's thirty-five years of sex discrimination decisions in new ways. While *Frontiero* and *Virginia* presented sex discrimination jurisprudence as redressing "a long and unfortunate history of sex discrimination"⁷¹ in the nineteenth century, *Hibbs* identifies the period *after Frontiero* as a period of ongoing and institutionalized constitutional violations.⁷² *Hibbs* characterizes as sex stereotypes judgments about "mothers and mothers-to-be"⁷³ that for much of the nation's history were deemed reasonable and holds that state action premised upon such judgments denies women equal citizenship, in violation of the Fourteenth Amendment. *Hibbs* gives a much narrower account of the "real sex differences" that can justify state action that differentiates between men and women than Rehnquist urged in his first decade on the Court.⁷⁴ *Hibbs* is the first Supreme Court equal protection decision to recognize that laws regulating pregnant women can enforce unconstitutional sex stereotypes.

III. THE REACH OF *HIBBS*: REMEDYING DISCRIMINATION AGAINST "MOTHERS AND MOTHERS-TO-BE"

Discrimination against new mothers and mothers-to-be has long gone undetected for a variety of reasons. Women who are about to give birth and who have just given birth are "mothers" in the most deeply symbolic sense: they are engaged in the role activity that anchors the entire system of social differentiation on which gender conventions are premised. That system of social roles justifies itself through narratives about physical differences in the reproductive capacity of the sexes; that is, the social relations of reproduction are justified by reference to the physical relations of reproduction—by "reasoning from the body."⁷⁵ It seems reasonable to single out women for

71. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion)).

72. *See Hibbs*, 538 U.S. at 729-32.

73. *Id.* at 736 (quoting *Joint Hearing*, *supra* note 9, at 100).

74. *See supra* text accompanying notes 30-45.

75. Siegel, *Reasoning from the Body*, *supra* note 1. When I first started teaching, I termed this practice "physiological naturalism" and described its operation in the Court's equal protection and due process decisions. *See id.* at 267-80.

Because the Court does not discriminate between the physical and social relations of reproduction, it evaluates regulatory decisions about reproduction as if they were merely responses to the physical realities of reproduction, and thus can "realistically reflect[] the fact that the sexes are not similarly situated in certain circumstances." The naturalistic framework in which the Court reasons about reproductive regulation obscures questions concerning its normative content that would be the central focus of doctrinal inquiry if the Court recognized that reproductive regulation concerned matters of gender, and not merely physiological sex.

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special and burdensome treatment because, as the Court explained in upholding sex-based protective labor legislation in its 1908 decision *Muller v. Oregon*,⁷⁶ “The two sexes differ in structure of body, in the functions to be performed by each. . . . This difference justifies a difference in legislation”⁷⁷

In the 1970s, at the urging of the modern women’s movement, the Court changed course and began to repudiate as unconstitutional “sex-stereotyping” forms of reasoning that it had once used to justify sex-based state action as constitutional. In *Frontiero*, for example, Justice Brennan recited the justification that Justice Bradley offered in *Bradwell v. Illinois*⁷⁸ for barring women from practicing law, “The paramount destiny and mission of woman are [sic] to fulfill the noble and benign offices of wife and mother. This is the law of the Creator,”⁷⁹ and observed “[a]s a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes.”⁸⁰ When the Court decided it would review sex-based state action under intermediate scrutiny review in *Craig v. Boren*,⁸¹ it warned against sex differentiation in law premised on “increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas.’”⁸² The Court’s 1970s cases prohibited sex-based state action premised on the assumption—descriptive or prescriptive—that husbands are breadwinners and wives are dependent caregivers. *Califano v. Westcott*⁸³ rejected this understanding as “part of the ‘baggage of sexual stereotypes’ that presumes the father has the ‘primary responsibility to provide a home and its essentials,’ while the mother is the ‘center of home and family life.’”⁸⁴

But while the Court was ready to repudiate state action premised on the descriptive or prescriptive assumptions that men and women had different roles in family and market activities, it did not repudiate the understanding that there were physical differences between the sexes that law could properly recognize. As Justice Ginsburg expressed it in *Virginia*: “‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”⁸⁵ The problem for the Court has been

Id. at 271-72 (quoting *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion)).

76. 208 U.S. 412 (1908).

77. *Id.* at 422-23.

78. 83 U.S. (16 Wall.) 130 (1873).

79. *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) (quoting *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring)).

80. *Id.*

81. 429 U.S. 190 (1976).

82. *Id.* at 198-99.

83. 443 U.S. 76 (1979).

84. *Id.* at 89.

85. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

differentiating between forms of state action that properly acknowledge sex differences and forms of state action that perpetuate sex stereotypes that “denigrat[e] . . . either sex” or impose “artificial constraints on an individual’s opportunity.” Summarizing the intermediate scrutiny cases for the Court in 1996, Ginsburg warned that sex classifications “may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.”⁸⁶

But when does government properly recognize real differences between the sexes and when does it engage in sex-stereotyping that the equal citizenship principle is now understood to prohibit? Rehnquist’s concurrence in *Virginia* and his majority opinion in *Hibbs* openly acknowledge that the practices understood to violate the equal citizenship principle have evolved in time. As a nation we now repudiate as sex stereotypes understandings and practices that the Court once thought wholly reasonable.⁸⁷ Practices of sex differentiation once justified through functional rationality—as practices that reflect and support the different physical roles of the sexes in reproduction—are now understood unconstitutionally to enforce different *social* roles in reproduction, “part of the ‘baggage of sexual stereotypes’ that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life.”⁸⁸

Hibbs applies this same framework. Rehnquist reasons from the premise that some practices realistically and fairly differentiate between the sexes, while others unjustly enforce sex role limitations that “denigrat[e]” the sexes and impose “artificial constraints on an individual’s opportunity”—and openly acknowledges that the nation’s judgment about whether practices licitly or illicitly differentiate between the sexes has shifted in history. In this respect, the Court’s judgments about the meaning of equal protection in matters concerning sex discrimination are much like the Court’s judgments about the meaning of equal protection in matters concerning race discrimination.⁸⁹ *Hibbs* emphasizes that the FMLA remedied a pattern of state action that violated the Constitution in the post-*Frontiero* period.⁹⁰ As in the case of race, the nation’s recognition that the Equal Protection Clause prohibited practices long thought constitutional did not bring about change overnight. Instead, it inaugurated a long period of debate and reassessment, as the nation sought to reconcile customary practices with its evolving constitutional understanding.

86. *Id.*

87. See Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 729 (2003).

88. Califano v. Westcott, 443 U.S. 76, 89 (1979).

89. Compare Plessy v. Ferguson, 163 U.S. 537 (1896) (allowing “separate but equal” racial segregation in public facilities), with Brown v. Bd. of Educ., 347 U.S. 483 (1954) (striking down “separate but equal” doctrine with respect to public education).

90. See *Hibbs*, 538 U.S. at 730 (“According to evidence that was before Congress when it enacted the FMLA [in 1992], States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits.”).

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Hibbs identifies an additional reason why there may be confusion in determining whether state action licitly or illicitly differentiates between the sexes. It is not simply that, over time, the nation's understanding of the forms of sex-based differentiation that are reasonable has evolved. Often, regulation may reflect judgments in which licit and illicit forms of reasoning about sex difference are intermingled. In *Hibbs*, much of the evidence of unconstitutional state action concerned discrimination in the award of family leave to male and female employees that straightforwardly perpetuated traditions of sex-based labor regulation once upheld in *Muller*.⁹¹ The record showed that some states simply awarded parenting leave to women and not men.⁹² But, the record also contained evidence of other, hybrid practices. Often, Rehnquist reports, states gave leave for childbearing *and* early parenting to women only, a form of leave the opinion refers to as "maternity" leave—using scare quotes to indicate that the leave was nominally for childbearing but was in fact (at least in part) a kind of leave that men might also have used for parenting purposes. Rehnquist observed:

Many States offered women extended "maternity" leave that exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit: Fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same. . . . This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work.⁹³

In these and other passages, *Hibbs* is analyzing forms of sex-discriminatory state action that reflect what we might call "concurrent" judgments: the state's decision to discriminate reflected (1) judgments based in functional rationality concerning the different *physical* roles of the sexes, *and* (2) judgments based in stereotypes concerning the different *social* roles of the sexes. Given the dynamics of concurrency, *Hibbs* recognizes, state regulation concerning pregnancy can reflect and enforce unconstitutional sex-role assumptions about women's role as mothers. Where state law provided female employees leave that the law indicated was for "pregnancy disability" but that far exceeded the medically recommended pregnancy disability leave period of six weeks, *Hibbs* reasoned, "[t]his gender-discriminatory policy is not attributable to any different physical needs of men and women, but rather to the invalid stereotypes that Congress sought to counter through the FMLA."⁹⁴ The duration of the "pregnancy disability" leave was evidence that states had regulated pregnant women in ways that reflected and enforced stereotypical assumptions about women's distinctive obligations as parents. *Hibbs*

91. See *supra* note 76 and accompanying text.

92. See *Hibbs*, 538 U.S. at 730-31.

93. *Id.* at 731; see also *id.* at 731 n.5.

94. *Id.* at 734 n.6.

emphasizes that laws regulating “pregnancy disability” in such a way as to perpetuate stereotypes about the special roles of men and women in work and family are “gender-discriminatory.”⁹⁵

Hibbs’s judgment that commonplace practices of regulating “mothers and mothers-to-be” reflect unconstitutional sex-role stereotypes, and not simply “real differences” between the sexes, has already been applied by the courts of appeal to recognize that new mothers face special forms of gender bias at work. Employers may doubt the abilities of new mothers for reasons of functional rationality: new mothers are in fact divided between family and work commitments. But employers may also doubt the abilities of new mothers (in ways they will not doubt the abilities of new fathers) for reasons rooted in sex roles: because they doubt a new mother’s fidelity to and competence in her role as an employee, her willingness to treat her obligations at work with the same seriousness as a man might.⁹⁶ These forms of reasoning might also be understood as reflecting concurrent judgments, as they fuse prediction *and* prescription, understandings rooted in both functional rationality *and* gender roles. Judgments that appear to concern workplace efficiency may instead reflect gender-role assumptions about the fidelity and competence of employees who are new mothers. Citing *Hibbs*, the Second Circuit recently decided an equal protection case in which it held that

95. *See id.* at 734 n.6.

96. Courts interpreting the Pregnancy Discrimination Amendment have long recognized this dynamic. *See, e.g.*, H.R. REP. NO. 95-948, at 3 (1978) (“The assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.”); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000) (noting that evidence that a direct supervisor had “specifically questioned whether [the plaintiff] would be able to manage her work and family responsibilities” supported a finding of discriminatory animus, where plaintiff’s employment was terminated shortly thereafter); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044-45 (7th Cir. 1999) (holding, in a Pregnancy Discrimination Act case, that a reasonable jury could have concluded that “a supervisor’s statement to a woman known to be pregnant that she was being fired so that she could ‘spend more time at home with her children’ reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake”); *id.* at 1044 (remarks by the head of plaintiff’s department that “she would be happier at home with her children” provided direct evidence of discriminatory animus). *See generally* *Venturelli v. ARC Cmty. Servs.*, 336 F.3d 606, 619 (7th Cir. 2003) (Evans, J., dissenting):

If an employer is allowed to take action based solely on the stereotype that new mothers are unlikely to return to work, it requires only a small step for companies to avoid hiring women of childbearing age altogether out of a fear that the women will some day become pregnant, take a substantial amount of time off, and perhaps never want to return to work at all. “I know how you women are,” an employer might tell a newly married applicant. “You decide it’s time to have a child, then once you have that baby, you’re not going to want to return.” Employers cannot refuse to hire a woman because they fear that she will have children and choose not to return to work—that’s precisely the type of discrimination the PDA was designed to prevent. *See* *Maldonado v. U.S. Bank*, 186 F.3d 759, 763 (7th Cir. 1999) (“[Congress] designed the PDA specifically to address the stereotype that ‘women are less desirable employees because they are liable to become pregnant.’” (quoting *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1045 (7th Cir. 1999))).

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[j]ust as “it takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school,’” . . . so it takes no special training to discern stereotyping in the view that a woman cannot “be a good mother” and have a job that requires long hours, or in the statement that a mother who received tenure “would not show the same level of commitment [she] had shown because [she] had little ones at home.” These are not the kind of “innocuous words” that we have previously held to be insufficient, as a matter of law, to provide evidence of discriminatory intent.⁹⁷

Joan Williams terms this set of understandings “maternal wall stereotyping.” Maternal wall stereotyping entails descriptive stereotyping, especially negative competence assumptions triggered by motherhood, pregnancy, and part-time work; it may also involve prescriptive judgments, especially hostility triggered by the assumption that working mothers belong at home.⁹⁸

IV. HIBBS, GEDULDIG, AND CASEY

Hibbs's analysis of sex-stereotyping in “pregnancy disability” leave represents a major development in equal protection law. It answers a question long ago reserved by the Court in *Geduldig v. Aiello*⁹⁹—whether state action regulating pregnant women discriminates on the basis of sex:

While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . and *Frontiero* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.¹⁰⁰

This passage in *Geduldig* has long been read as deciding, in the negative, the question of whether for purposes of equal protection analysis a law regulating pregnancy discriminates on the basis of sex. In fact, *Geduldig* holds that “not . . . every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . and *Frontiero*.” It leaves open the possibility that *some* legislative classifications concerning pregnancy *are* sex-based classifications like those considered in *Reed* and *Frontiero*. And *Hibbs* provides examples of legislative classifications concerning pregnancy (e.g., statutes that grant “maternity” leave and “pregnancy disability” leave)

97. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 256 (1989)).

98. Williams, *supra* note 58, at 387-95.

99. 417 U.S. 484 (1974).

100. *Id.* at 496-97 & n.20.

that the Court holds are “gender-discriminatory”¹⁰¹ and rest on “the pervasive sex-role stereotype that caring for family members is women’s work.”¹⁰²

Hibbs holds that legislation offering “pregnancy disability” leave to women in excess of the amount of time medically indicated violates the Equal Protection Clause because it gives a benefit to women that might also be given to men; the classification concerning pregnancy discriminates between men and women in these cases because it reflects and reinforces sex stereotypes concerning the different roles and responsibilities of fathers and mothers. We might read *Hibbs* as limiting *Geduldig* sub silentio, but it seems as reasonable to read *Hibbs* as answering the question *Geduldig* reserved.¹⁰³ Where regulation of pregnant women rests on sex-role stereotypes, it is sex-based state action within the meaning of the Equal Protection Clause. To establish that a legislative classification concerning pregnancy is sex-based state action within the meaning of the Equal Protection Clause, the challenging party would have to advance evidence, such as the evidence in *Hibbs* that “pregnancy disability” leave was longer than medically needed, to demonstrate that the challenged regulation reflected sex-role typing and was not attributable to reproductive physiology alone.¹⁰⁴ If the challenging party produces evidence, such as the

101. Nev. Dep’t of Human Res. v. *Hibbs*, 538 U.S. 721, 734 n.6 (2003).

102. *Id.* at 731; *see also id.* at 731 n.5.

103. Even though, as *Geduldig* asserts, “Normal pregnancy is an objectively identifiable physical condition with unique characteristics,” *Geduldig*, 417 U.S. at 497 n.20, *Hibbs* demonstrates that pregnant women often are the object of sex-stereotyping because they inhabit the social role of motherhood. With evidence that the regulation of pregnancy is premised on such stereotyping, we may view “distinctions involving pregnancy [as] mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.” *Id.*; *cf.* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (“The community is harmed by the State’s participation in the perpetuation of invidious group stereotypes. . .”).

Some might resist this characterization of the constitutional wrong. As we have seen, the regulation of pregnant women often involves concurrent judgments that fuse functional rationality with forms of sex-role reasoning that seem benign to many—and so *not* “mere pretexts designed to effect an invidious discrimination against the members of one sex.” *Geduldig*, 417 U.S. at 497 n.20. On this account, *Hibbs* is not demonstrating forms of state action that fall within the exception outlined in *Geduldig*; instead, when *Hibbs* discusses laws that regulate pregnant women on the basis of sex-role stereotypes as evidence of equal protection violations that Congress could remedy through Section 5, the Court must be limiting *Geduldig* sub silentio. On this account, the Court’s reasoning in *Hibbs* limits the reach of its decision in *Geduldig*: whenever a plaintiff can supply evidence that the regulation of pregnant women reflects sex-role stereotyping and is not attributable to real physical differences only, the plaintiff can demonstrate that the challenged regulation is unconstitutional sex-based state action.

104. *Cf. Hibbs*, 538 U.S. at 731 (“This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”). The crucial factor in establishing that a classification concerning pregnancy is a sex-based classification is evidence that establishes that the regulation reflects sex stereotypes and is not solely attributable to physical differences between the sexes. The examples of unconstitutional regulation the Court considered in *Hibbs* included cases where there was no basis in reproductive physiology for distinguishing between the sexes, as well as cases where

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evidence in *Hibbs*, that a classification concerning pregnancy reflects stereotyping, then the classification would be analyzed as “a sex-based classification like those considered in *Reed* . . . and *Frontiero*.”¹⁰⁵ There would be no need to prove discriminatory purpose. *Hibbs* analyzes statutes providing unduly lengthy “maternity” leave and “pregnancy disability” leave as reflecting sex stereotypes that violate the Constitution without ever discussing questions of discriminatory purpose, as the dissent complains;¹⁰⁶ silence about questions of discriminatory purpose in *Hibbs* is further support that *Hibbs* treats classifications concerning pregnancy that reflect sex stereotypes as sex-based state action within the meaning of the exception reserved in *Geduldig*.

Reading *Hibbs* and *Geduldig* together in this fashion explains why the Pregnancy Discrimination Amendment (PDA) is “appropriate legislation” to enforce the Equal Protection Clause under the Court’s Section 5 cases.¹⁰⁷ The PDA defines “sex” discrimination under Title VII to include discrimination on the basis of “pregnancy, child birth or related medical conditions,” and provides that “[w]omen affected by pregnancy, childbirth or related medical

regulation was attributable in part to judgments based in functional rationality concerning differences in physical roles and in part to judgments based in stereotypes concerning differences in social roles. *See supra* text accompanying notes 92-95.

Geduldig treats as relevant to the question of determining whether the state has classified on the basis of sex the fact that only some, not all, women may be pregnant, but the Court has not adhered to this framework in its subsequent equal protection opinions. For example, the affirmative action cases treat preferences extended to some but not all members of a group as group-based classifications. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 16-17 (2003). In any event, as the Court’s own equal protection cases subsequently recognize, it is the capacity to become pregnant that defines women physically and socially as a group.

105. *Geduldig*, 417 U.S. at 496-97 & n.20.

106. *See Hibbs*, 538 U.S. at 749-50, 751 (Kennedy, J., dissenting) (suggesting that, to find a constitutional violation in the allocation of family leave, would require a record showing evidence of “purposeful discrimination”).

107. *Hibbs* presents Title VII, the Pregnancy Discrimination Amendment, and the FMLA as remedies for a pattern of unconstitutional conduct involving discrimination against “women when they are mothers and mothers-to-be”—a form of bias it understands to be at the root of sex discrimination. *See id.* at 736-37. *Hibbs* notes that Congress determined that [h]istorically, denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women’s roles has in turn justified discrimination against women when they are mothers or mothers-to-be.

Id. at 736. The Court continued:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Id.

conditions . . . [must] be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work”¹⁰⁸ The PDA allows employers to take employment action against pregnant employees so long as pregnant employees are treated the same “as other persons not so affected but similar in their ability or inability to work.” Failure to treat pregnant employees “the same as other persons not so affected but similar in their ability or inability to work” reflects the unconstitutional sex-role stereotype that, as *Hibbs* put it, “women’s family duties trump those of the workplace.”¹⁰⁹ On this account, the PDA is a congruent and proportional means of enforcing the Equal Protection Clause as interpreted in *Geduldig* and *Hibbs*—especially in light of the fact that, under the Court’s Section 5 cases, “Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”¹¹⁰

The Ninth Circuit has recently offered a similar reading of *Hibbs* and *Geduldig* in *Tucson Woman’s Clinic v. Eden*,¹¹¹ a case involving an equal protection challenge to laws restricting access to abortion clinics. In considering whether laws singling out abortion clinics for regulation presented a cognizable equal protection question, the Ninth Circuit considered the Court’s holding in *Geduldig*¹¹² and observed that *Hibbs* had limited *Geduldig*’s reach:

[T]he Supreme Court recently implied that laws which facially discriminate on the basis of pregnancy, even those that facially appear to benefit pregnant persons, can still be unconstitutional if the medical or biological facts that distinguish pregnancy do not reasonably explain the discrimination at hand.¹¹³

The Ninth Circuit then quoted the passages of *Hibbs* discussing “‘pregnancy disability’ leave” that is longer than medically needed and observed, “*Hibbs*

108. 42 U.S.C. § 2000e(k) (2006).

109. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 731 n.5 (2003); *cf.* *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1045 (7th Cir. 1999):

Discrimination on the basis of pregnancy is part of discrimination against women, and one of the stereotypes involved is that women are less desirable employees because they are liable to become pregnant. This was one of Congress’ concerns in passing the Pregnancy Discrimination Act. *See Amending Title VII, Civil Rights Act of 1964*, S. Rep. No. 95-331, 95th Cong., 1st Sess. at 3 (1977); *Prohibition of Sex Discrimination Based on Pregnancy*, H.R. Rep. No. 95-948, 95th Cong., 2d Sess. at 3 (1978) (“As the testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.”).

110. *See supra* text at note 65.

111. 379 F.3d 531 (9th Cir. 2004).

112. *Id.* at 548 (characterizing *Geduldig* as holding that “denial of disability benefits for pregnant persons only was not equivalent to a gender classification under the equal protection clause, even though only women become pregnant” and observing that “imposing a disability on pregnant women might nevertheless amount to sex discrimination under the equal protection clause”).

113. *Id.*

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strongly supports plaintiffs' argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender."¹¹⁴

The Ninth Circuit did not proceed directly to an equal protection analysis of the clinic licensing restrictions, however, in part because it was not certain to what extent *Hibbs* authority in Section 1 cases was qualified by the fact that it was a Section 5 case,¹¹⁵ and in part because it thought the equal protection concerns in the case were properly raised *within* the undue burden analysis mandated by *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹¹⁶ The Ninth Circuit read *Casey*'s undue burden analysis, as many commentators have,¹¹⁷ to protect a pregnant woman's liberty *and* equality interests in making a decision whether to terminate a pregnancy.¹¹⁸ It went on to hold that constitutional values vindicated by equal protection intermediate scrutiny were an integral part of undue burden analysis. In the Ninth Circuit's view, the equal protection restrictions that *Hibbs* imposed on the regulation of pregnancy were also enforced by undue burden analysis in *Casey*, as it limited an abortion-restrictive regulation that reflects paternalism or sex-stereotyping:

In fact, elements of intermediate scrutiny review particular to sex-based classifications, such as the rules against paternalism and sex-stereotyping, . . .

114. *Id.*

115. The Ninth Circuit further explained:

Congress, in enacting section 5 legislation, can respond to state action that is unconstitutional regardless of whether a court would be capable of adjudicating that unconstitutionality. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641, 649-50, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966). Thus, *Hibbs* does not compel the conclusion that this is the sort of discrimination a court can remedy, given the nature of judicial deference to legislative distinctions embodied in equal protection and undue burden jurisprudence.

Id.

116. 505 U.S. 833, 875 (1992).

117. *See* Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 531-35 (2003); Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL F. 137, 147-50; Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* (Martha Albertson Fineman & Isabel Karpin eds., 1995) (surveying equality arguments for the abortion right in law review literature and in *Casey*). For opinions rewriting *Roe* as a sex equality opinion, see *WHAT ROE V. WADE SHOULD HAVE SAID* (Jack M. Balkin ed., 2005) (including opinions by Jack Balkin, Reva Siegel, and Robin West.).

118. *See Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 548-49 (9th Cir. 2004). The Ninth Circuit stated:

[C]ourts have taken notice of the fact that the right to obtain an abortion is tied to the right to be free from sex discrimination in a manner unlike any other medical service that only one gender seeks. Abortion is unique in that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 856, 112 S. Ct. 2791. However, even if laws singling out abortion can be judicially recognized as not gender-neutral, where such laws facially promote maternal health or fetal life, *Casey* replaces the intermediate scrutiny such a law would normally receive under the equal protection clause with the undue burden standard.

Id.

are evident in the *Casey* opinion, and should be considered by courts assessing the legitimacy of abortion regulation under the undue burden standard. *See Casey*, 505 U.S. at 882 . . . (approving only of information provided to a woman seeking an abortion that is “truthful and not misleading”); *id.* at 898 . . . (“A State may not give to a man the kind of dominion over his wife that parents exercise over their children. Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.”).¹¹⁹

The Ninth Circuit’s opinion did not make clear, however, why there was no independent equal protection review; how, if the equal protection and due process inquiry converged, constitutional protections against paternalism and sex-stereotyping in regulating pregnancy should guide the application of undue burden analysis; or how these constitutional protections might limit the ways states could assert their interests in restricting abortion to protect maternal health or to protect potential life.¹²⁰ Given the extreme forms of paternalism and sex-stereotyping expressed in nineteenth-century arguments for criminalizing abortion to protect maternal health and to protect unborn life,¹²¹

119. *Id.* at 549.

120. *Cf. id. Roe* was decided before the Court adopted its intermediate scrutiny framework in the equal protection sex discrimination cases. *Roe* recognized the state’s interest in regulating abortion to protect maternal health and potential life without subjecting expressions of those regulatory interests to the kinds of scrutiny for gender bias that the Court’s equal protection cases might, but *Roe* also sharply limited expression of these regulatory interests through the trimester framework. When *Casey* replaced the trimester framework with undue burden analysis, concern about the risk of gender bias in abortion regulation became a much more explicit part of the substantive due process inquiry. *See supra* text accompanying note 119; *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (“Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”); *id.* at 898 (rejecting spousal notice provision on the grounds that it reflected “a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution”).

Just as *Casey* reviewed Pennsylvania’s spousal notice law with concern that it might perpetuate traditional views of marital roles now understood to violate equal protection, so too a court might scrutinize regulation purporting to serve legitimate state interests in regulating abortion to ensure that unconstitutional assumptions about the different roles of men and women have not shaped the manner in which the state has chosen to vindicate its legitimate interests in regulating the procedure. Pronounced forms of underinclusivity or overinclusivity in the means by which the state has pursued its interest in protecting maternal health or potential life might reveal that abortion regulation in fact rests on unconstitutional sex stereotypes about women—“increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas.’” *Craig v. Boren*, 429 U.S. 190, 198-99 (1976) (citation omitted).

121. *See* Siegel, *Reasoning from the Body*, *supra* note 1, at 287-318. (showing how arguments about women’s roles were expressed as arguments about women’s bodies in nineteenth-century arguments for criminalizing abortion to protect maternal health and

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such an inquiry is clearly warranted—especially as *Casey* itself looked to history as it determined whether a spousal notice law imposed an undue burden on a woman's right to choose.¹²²

CONCLUSION

This Article is not the place to determine whether *Hibbs* supports equal protection review of abortion restrictions or how *Hibbs* might strengthen the sex-equality component of *Casey*'s undue burden inquiry. Surely Chief Justice Rehnquist would want no part of such matters, given his longstanding opposition to *Roe*.¹²³ But this Article *is* a place to marvel that Chief Justice Rehnquist would conclude his career on the Court by writing an equal protection opinion that would raise such questions. That Rehnquist wrote *Hibbs* as he did seems attributable to deep changes in public understanding of gender roles of a kind that transcend individual opinion.

Hibbs was written a quarter century after Congress amended Title VII in order to reverse Rehnquist's decision in *General Electric Co. v. Gilbert*¹²⁴ and make plain that protections against sex discrimination include protections against discrimination on the basis of pregnancy. A quarter century of women's workforce participation under the protections of the Pregnancy Discrimination Amendment changed the social meaning of laws regulating pregnancy sufficiently that such laws came vividly to represent the threat of sex-stereotyping, as well as a response to real physical difference, even for Chief Justice Rehnquist. In dramatic contrast to Rehnquist's early emphasis on pregnancy as a site of real physical difference, *Hibbs* presents Title VII, the Pregnancy Discrimination Amendment, and the Family and Medical Leave Act as remedies for state action reflecting sex stereotypes about "women when they are mothers and mothers-to-be"—a form of bias *Hibbs* describes as the root of sex discrimination.¹²⁵ Where Rehnquist once saw questions of women's bodies, he now saw questions of women's roles. And with this shift in perspective, what were once constitutional reasons now appeared as constitutional wrongs. Several decades of social movement struggle had transformed the practices of sexual differentiation Americans understood to be consistent with equal citizenship.¹²⁶ *Hibbs* is quite frank in recounting this shift in constitutional

unborn life).

122. *Casey*, 505 U.S. at 898.

123. *Roe v. Wade*, 410 U.S. 113, 171-78 (1973) (Rehnquist, J., dissenting).

124. 429 U.S. 125 (1976).

125. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736-37 (2003); see also *supra* note 107.

126. See Siegel, *Constitutional Culture*, *supra* note 1 (demonstrating how social movement conflict, encouraged and constrained by constitutional culture, can generate new understandings that officials can enforce and the public will recognize as the Constitution through a case study that traces the rise of modern sex discrimination law from the debates over the Equal Rights Amendment).

perspective, as the nation's and as the Court's own.¹²⁷

And so the Justice who came on the bench warning against the seductions of the "living Constitution"¹²⁸ came in his own interpretation of the Fourteenth Amendment openly to acknowledge its practice. Chief Justice Rehnquist understood that the Constitution changes in history, responsively with public debate.¹²⁹ It is, after all, the "living Constitution's" most passionate critics who are its truest proponents.¹³⁰

127. *Hibbs*, 538 U.S. at 729-30, 737.

128. William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976) ("At first blush it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution. It would seem that only a necrophile could disagree.").

129. Reflecting on whether "judges respond to public opinion," Rehnquist once wrote: [If the] tides of public opinion are sufficiently great and sufficiently sustained, they will very likely have an effect upon the decision of some of the cases decided within the courthouse. This is not a case of judges "knuckling under" to public opinion, and cravenly abandoning their oaths of office. Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.

William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 751-52 (1986).

130. See Siegel, *Constitutional Culture*, *supra* note 1 ("Originalism, in other words, is not merely a jurisprudence. It is, first and foremost, a discourse employed in politics to mount an attack on courts. Since the 1970s, originalism's proponents have deployed the law/politics distinction and the language of constitutional restoration in the service of constitutional change—so successfully that, without Article V lawmaking, what was once the language of a constitutional insurgency is now the language of the constitutional establishment."); Robert Post & Reva Siegel, *Originalism As a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. (forthcoming 2006) ("To grasp the phenomenon of originalism is to appreciate the subtle ways in which it connects constitutional law to a living political culture. In almost every particular the political practice of originalism contradicts the jurisprudential tenets of originalism.").

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